



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2008-04) *WILL EXECUTION REQUIREMENTS* *"HARMLESS ERROR RULE"*

To: State Bar Office of Governmental Affairs

From: Sil Reggiardo, Legislative Co-Chair
Trust and Estates Section Executive Committee

Re: Amendment to Probate Code §6110
Re: Will Execution Requirements
Project #2007-03

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Contact & Section Legislative Co-Chair

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I. Introduction

California has technical and unintuitive printed will execution requirements that lay a trap for those executing wills, particularly self-drafted wills. The following hypothetical illustrates the problem:

A and B have been together for years but have not married and have no children. A talks to his brother, an estate planning attorney, about a will. A wants to leave his property to B. She is the most appropriate beneficiary. A receives proper instructions for a hand-written holographic will, writes one that accomplishes his objectives, and puts it in a drawer. He later finds it and decides a typed will would be neater (he sits at a computer most of the day and wonders why, with his poor hand-writing and spelling, he did not type a will in the first place). He runs the first will through the shredder at his desk, types a virtually identical one, and prints it out as two friends

arrive to go golfing with him. He asks them to wait a moment while he signs his will. They watch him sign it and put it in a desk drawer before they leave. A later mentions this event, and his brother tells him to have his two friends sign the typed will below his signature as witnesses, for otherwise A's property would pass to their parents under the laws of intestate succession at A's death. A proper living trust package (with the same dispositive plan) soon arrives by mail with instructions regarding how to execute the documents. The instructions state that if A cannot find a conveniently located notary and wants to put the trust into effect, he should sign the trust agreement and related general transfer document (the typical kind providing for immediate trust funding pending formal funding) and then get the other documents (including a pour-over will) signed promptly before a notary or witnesses as appropriate.

Under current California law, the holographic will would have been valid. The typed will would not have been valid until the two witnesses signed it, and had A not replaced it with a trust but died with it in effect the will would have been invalid unless the witnesses signed it during A's lifetime. Despite the lack of witnesses, the trust probably would have been accepted in most California courts as a validly funded trust that transfers A's property to B at his death. In a state that has adopted the Uniform Probate Code ("UPC") and its "harmless error" will execution exception, even the unwitnessed typed will could be accepted by a probate court as a valid will because, despite its lack of technical compliance with the will execution requirements, clear and convincing evidence could show that A intended that document to be his will. A California court would not have the authority to uphold the typed but unwitnessed will. Such is the unintuitive state of California testamentary document execution.

Probate Code §6110 should be amended to include the UPC Section 2-305 "harmless error" rule, which allows a court to uphold a will (or codicil) not executed in accordance with normal statutory requirements if the court finds clear and convincing evidence that the testator intended the document to be the testator's will. Section 6110 should further be amended to reflect the California Supreme Court's recent holding in *Estate of Saueressig*, 38 Cal. 4th 1045 (2006) that the witnesses to a printed will must sign the will during the testator's lifetime.

II. Will Execution Requirements

An effective will must comply with statutory will formalities requirements that address style, content and document execution. Property that would otherwise pass under an ineffective will passes under the laws of intestate succession. In that event, the State essentially writes the will.

California makes the typical distinction between (1) a holographic will with the material provisions and signature in the testator's hand writing, and (2) a printed will. California's printed will execution requirements are technical and unforgiving. Probate Code §6110 provides that with limited exceptions, a printed will must satisfy some strict requirements. The section states in relevant part:

- (b) The will shall be signed by one of the following:
 - (1) By the testator.
 - (2) In the testator's name by some other person in the testator's presence and by the testator's direction.
 - (3) By a conservator pursuant to a court order to make a will under Section 2580.

- (c) The will shall be witnessed by being signed by at least two persons each of whom
- (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and
 - (2) understand that the instrument they sign is the testator's will.

Will formalities statutes attempt to strike a balance between two potentially competing legal policies: allowing people to leave property as they desire on the one hand, while attempting to ensure that wills reflect a voluntary and reasonably informed decision on the other hand. The ability to make testamentary property transfers is a hallmark of fee ownership, distinguishing it from lesser estate, such as a life estate.

One cannot determine from the face of a will whether it is valid. Even if it looks proper in format and content, the will or portions of it could fail or yield to statutory overrides for a number of reasons. For example, the testator could have lacked testamentary capacity; witnesses might not have understood the nature of the document or properly witnessed the will; the will or a gift under it could have resulted from undue influence, or in the case of a care giver, be presumed to have resulted from such influence; or omitted spouse, omitted child, or probate homestead statutory overrides may require that some estate property pass to or for the benefit of people not mentioned or sufficiently provided for in the will. In the event of a dispute, probate courts are well equipped to deal with these inquiries.

III. Courts' Struggle With Will Execution Requirements

§6110(c) requires that a will be signed by at least two witnesses who “being present at the same time, witnessed either the signing of the will or the testator’s acknowledgment of the signature or of the will” The courts have struggled with this language.

§6110 was amended in 1985 to remove certain formal requirements that operated as potential traps, including the requirement that the witnesses sign the will in the testator’s presence. Prior to the amendment, witnesses had to sign the will in the testator’s presence and, therefore, no reasonable question existed regarding whether they had to sign during the testator’s lifetime. This statutory amendment raised that question. A divided California Supreme Court resolved that question in *Estate of Saueressig*, 38 Cal. 4th 1045 (2006), holding over a vigorous dissent that the witnesses must sign during the testator’s lifetime.

Prior to *Estate of Saueressig* the Courts of Appeal reached different conclusions regarding whether section 6110(c) allowed witness attestation after the testator’s death. For example, in *Crook v. Contrers* (2002) 95 Cal.App.4th 1194, 1199, 1201, 1203, the court held invalid codicils lacking two signatures at the testator’s death. Conversely, in *Eugene* (2002) 104 Cal.App.4th 907, 909, the drafting attorney attested as a witness to only the first of two mutual wills under which sisters left their property to each other. The survivor’s will left her property to a charity. The court directed probate of the will, reasoning that neither the “public administrator nor anyone else” challenged the charitable transfer and “there [was] not the slightest hint of fraud or any wrongdoing by anyone involved at the time the wills were executed or at any time thereafter.” (*Id.* at pp. 910, fn. 1, 912, 914, fn. 5.).

Finding no express language addressing whether the witnesses must sign during the testator's lifetime, the court in *Estate of Saueressig* considered the legislative history behind §6110, how other states with similar statutes approach the problem, and the policy arguments in favor of requiring attestation during the testator's lifetime. The court concluded that in making the statutory amendments raising this attestation issue, the Legislature never intended to change the requirement of attestation during the testator's lifetime. While some courts in other states have followed the UPC approach and have allowed attestation within a reasonable time of the testator's death, the *Estate of Saueressig* court preferred a bright-line test. It noted that California has not adopted the UPC will execution provisions, including UPC harmless error rule that gives courts flexibility regarding wills not executed in accordance with normal statutory requirements.

§6110(c) should be amended to codify the *Estate of Saueressig* requirement that the witnesses to the will sign the will during the testator's lifetime. The purpose of the amendment would be to provide estate planners with clear statutory language.

IV. Need for UPC Harmless Error Rule

Estate of Saueressig and others involving will execution requirements illustrate how the technicalities of §6110(c) are a trap even for attorneys involved in the will execution process. These technicalities are a minefield for non-lawyers drafting anything but a hand-written holographic will - something that will become less common. The ability to pass property through a will important. Will execution requirements should reflect the rational expectations of society and should not act as traps. People should be able to draft effective wills without detailed advice regarding technical will execution requirements.

California needs the UPC Section 2-305 "harmless error" exception, which provides as follows:

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

That exception would allow a court to hold a will valid in circumstances like *Estate of Eugene* and *Estate of Saueressig*, where the courts concluded that the wills reflected what the testators intended. This flexibility could become particularly important in an era of increased cohabitation by unmarried couples who cannot register as domestic partners, which means they cannot acquire community property together or be each other's heirs at law. And it will become increasingly important as more people can be expected to type rather than hand-write wills. We increasingly live in a society of typists. Technology has changed writing habits and placed them on a collision course with California's unforgiving and unintuitive will execution requirements, which have become antiquated because they assume people either hand-write a holographic will or use a printed will after receiving proper advice regarding will execution. We live in a world of computers. We can expect that with increasing frequency people will type, print and sign wills in the manner set forth in the hypothetical above.

Would allowing a court to probate the will despite the lack of witnesses open the door for more abuse? It could. It is quite possible, for example, that one could type a will and have the testator sign it under duress or without reading it carefully. But even a holographic will can result from undue influence, and a testator can fail to carefully review a properly witnessed will. The normal lack of capacity and undue influence rules would continue to apply. If the situation involves a caregiver, the burden of proof shift under the §§21350 and 21351 caregiver rules would apply. And under the UPC harmless error rule, the court would need to find clear and convincing evidence that the testator intended the document to be the testator's will. In short, the harmless error exception combined with other existing safeguards would further the objectives of carrying out the testator's intent while preventing fraud and abuse. This combination would be far more likely to reflect the rational expectations of a society that is likely to type wills with increasing frequency.

There are reasonable arguments for completely eliminating will witness attestation requirements. Some point out, for example, that there is no such requirement for a revocable trust or general transfer document, and that the courts routinely uphold unfunded trusts (particularly those supported with a general transfer) under Section following the filing of a "Heggstad" petition. (See *Estate of Heggstad*, (1993)16 Cal. App. 4th 943.) Some find anomalous the lack of a witness requirement for a living trust that transfers a significant estate, while the related safety net pour-over will requires witnesses. But the living trusts (particularly those accompanied by a general transfer) are normally the products of legal counsel likely to consider whether the settlor is acting freely and has the requisite testamentary capacity. Those protections often do not exist for self-drafted wills. Therefore, we are not proposing that will witness requirements be eliminated.

The UPC Section 2-305 harmless error exception would not have the effect of eliminating witness requirements for printed wills. It would place properly executed wills on a different footing from improperly executed wills. Properly executed wills carry the presumption of validity. ("[T]he rule is that proof of the signatures of the testator ...and the witnesses makes out a *prima facie* case of due execution." *Estate of Fletcher* (1958) 50 Cal. 2d 317, 319.) Those challenging the will have the burden of proving their case, which in the case of undue influence or lack of capacity challenges can require a mountain of evidence. Under the UPC harmless error rule, the improperly executed will has effect only if the proponent proves by clear and convincing evidence that the testator intended the document as his or her will.

PENDING LEGISLATION:

No similar legislation has been introduced to date.

PENDING LITIGATION:

None known.

FISCAL IMPACT:

No anticipated fiscal impact.

LIKELY SUPPORT/OPPOSITION:

There is no known opposition.

GERMANENESS:

The State Bar's Trusts and Estates Section deals with drafting and implementing wills. Section members are involved in such estate planning on a regular basis. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estate Section of the State Bar of California.

TEXT OF PROPOSAL:

SECTION 1. Section 6110 of the Probate Code is amended to read:

6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed by one of the following:

(1) By the testator.

(2) In the testator's name by some other person in the testator's presence and by the testator's direction.

(3) By a conservator pursuant to a court order to make a will under Section 2580.

(c) The will shall be witnessed by being signed *during the testator's lifetime* by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will.

(d) Although a will or writing added upon a will was not executed in compliance with subsection (c), the will or writing is treated as if it had been executed in compliance with that subsection if the proponent of the will or writing establishes by clear and convincing evidence that the decedent intended the will or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of a formerly revoked will or of a formerly revoked portion of the will.